85-1668

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1985

IN RE GRAND JURY PROCEEDINGS,
RANDALL UNDERHILL, d/b/a EASTSIDE MOTORS and
WARD MASSEY, Petitioners

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

A Writ of Certiorari is respectfully sought to review the decision of the United States Court of Appeals for the Sixth Circuit which reversed the determinations of the District Court for the Western District of Kentucky and the District Court for the Eastern District of Kentucky that the act of producing odometer statements considered by the courts to be required records held by sole proprietor car dealers in their individual capacity is privileged and remanding the consolidated cases with instructions to rescind the orders quashing the grand jury's subpoena duces tecum.

QUESTIONS PRESENTED FOR REVIEW

1. Whether an individual, in this case a sole proprietor car dealer, is entitled to the protection of the Fifth Amendment privilege against self-incrimination, when compelled by a federal grand jury subpoena duces tecum to produce records required by law to be kept or disclosed to a public agency when the act of producing such records would tend to incriminate him.

2. Whether the odometer statements prepared by the car dealers are, in fact, records which fall within the required records doctrine.

3. Whether the Petitioners intelligently, knowingly and voluntarily waived their constitutional privilege against producing and authenticating the odometer statements to a federal grand jury with sufficient awareness of the consequences.

4. Whether the act of producing records required by law to be kept or disclosed to an agency can be compelled without the statutory grant of immunity.

PARTIES TO THE PROCEEDINGS BELOW

The parties to this action are Petitioner, Randall Underhill, d/b/a Eastside Motors; Petitioner, Ward Massey; Respondent, United States of America.

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OPINIONS BELOW

The opinion and judgment of the Court of Appeals for the Sixth Circuit reversing the judgments in favor of the Petitioners as rendered by the District Court for the Western District of Kentucky and the District Court for the Eastern District of Kentucky appears in the Appendix A to this Petition, and is reported at 781 F.2d 64 (6th Cir. 1986). The order of the Court of Appeals for the Sixth Circuit denying a petition for rehearing en banc appears in Appendix B to this Petition. The opinion and order of the District Court for the Western District of Kentucky appears in Appendix C. The opinion and order of the District Court for the Eastern District of Kentucky appears in Appendix D.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit (Appendix A) was decided and filed on January 13, 1986. A timely petition for rehearing en banc was denied on February 27, 1986. (Appendix B). The

Court's Order staying mandate was entered on March 14, 1986. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . .

The statutes involved are set forth in Appendix F. They include 15 U.S.C. § 1981, et seq. and are a portion of those statutes popularly known as the Motor Vehicle Information and Cost Savings Act. They also include the immunity statutes found at 18 U.S.C. § 6002 and § 6003.

STATEMENT OF THE CASE

This action was instituted in the federal courts pursuant to a federal grand jury investigation into violations of the Motor Vehicle Information and Cost Savings Act. On November 26, 1984, a federal grand jury subpoena duces tecum was issued to be served upon Randall

Underhill, d/b/a Eastside Motors. Underhill was compelled to produce the following:

(1) All odometer mileage statements, including those provided to buyers and received from sellers, for vehicles bought or sold by Eastside Motors between and including June 1, 1981 and June 1, 1982.

(2) Copies of all documents filed with state or local government authorities for the purpose of meeting recording requirements, obtaining approval to do business, or to obtain registration or licensing of any kind.

(3) All publicly filed documents, or copies thereof, designating or authorizing persons to sign documents on behalf of Eastside Motors or listing persons who are authorized to bind Eastside Motors.

(4) All federal W-2 and W-4 tax withholding forms produced by Eastside Motors for the years 1981 and 1982.

Underhill filed a motion to quash the subpoena on Fifth Amendment grounds. He subsequently produced all of the requested records with the exception of the odometer statements, asserting that the act of producing the odometer statements would tend to

incriminate him. Judge Allen of the District Court for the Western District of Kentucky determined that the odometer statements were "required records" and that their contents were not privileged, but the act of producing them was privileged and could not be compelled without a statutory grant of immunity. Judge Allen determined that the odometer statements would have to be authenticated by Underhill which would require a testimonial incriminating communication by him. The Judge sustained Underhill's motion to quash the subpoena.

On October 19, 1984, a federal grand jury subpoena duces tecum was issued to be served on Ward Massey. Massey was compelled to produce the following:

> "(1) All odometer mileage statements, including both those provided to buyers and received from sellers, for vehicles which were titled in the name of A.T.V. Leasing between and including April 1, 1984 to September 15, 1984.
>
> (2) Copies of all documents filed with State or local government authorities for the purpose of meeting reporting requirements, obtaining approval to do business or to obtain registration or licensing of any kind.

(3) All documents designating or authorizing persons to sign documents on behalf of A.T.V. Leasing or listing persons who are authorized to bind A.T.V. Leasing.

(4) All Federal W-2 and W-4 tax withholding forms produced by A.T.V. Leasing for the years 1983.

(5) The witness shall be requested to provide hand writing samples to the Grand Jury or its designate."

When Ward Massey was summoned before the Grand Jury, he invoked the Fifth Amendment to both the act of production and the contents of the documents. Judge Reed of the District Court for the Eastern District of Kentucky determined that the act of production or nonproduction of said records constituted a risk of testimonial self incrimination which was both "substantial and real". The Court further relied on the fact that the government stated in Court that it would prosecute Ward Massey if he did not produce those documents. The Judge sustained Massey's Motion to Quash the Subpoena.

Therefore, both district courts determined that the act of producing the odometer state-

ments would incriminate the Petitioners. The records requested are the personal business records of individuals who operate as sole proprietors and are held by the Petitioners in their individual capacity. The Government appealed both district court decisions to the Court of Appeals for the Sixth Circuit which were consolidated by that Court by order dated March 28, 1985.

The Court of Appeals in its opinion determined that the contents as well as the act of producing the odometer statements fell within the required records exception to the Fifth Amendment and held the odometer statements must be produced by the Petitioners.

The Petitioners filed a timely suggestion for rehearing en banc. Their petition was denied on February 27, 1986. The Petitioners moved for an order staying the mandate which was granted on March 14, 1986 with orders that the mandate issue within thirty (30) days unless the Petitioners filed a Petition for Writ of Certiorari with the United States Supreme Court before that time expired.

ARGUMENT FOR ALLOWANCE OF WRIT

The United States Court of Appeals for the Sixth Circuit has decided an important question of federal law which has not been, but should be, settled by the U.S. Supreme Court.

The Sixth Circuit decided in Grand Jury Subpoena Duces Tecum, Underhill, 781 F.2d 64 (6th Cir. 1986) that an automobile dealer's odometer disclosure statements are "required records" as defined by the required records exception to the Fifth Amendment privilege against self-incrimination and must be produced despite the fact that two lower courts determined that the act of producing the documents would incriminate the individuals.

The Petitioners fail to see any regulatory purpose for retaining the odometer disclosure statements for four (4) years (within the federal statute of limitations for criminal prosecution) other than as evidence for use for either civil or criminal sanctions for odometer tampering.

The logic in reporting the odometer reading at the time of buying or selling a car is reasonable. But only dealers are required to retain the odometer disclosure statements for four (4) years and the only logical regulatory purpose is to preserve evidence to be used against those dealers for criminal or civil sanctions. Therefore, the Petitioners believe the record-keeping statute is directed toward a group highly suspect of criminal activity and thus the odometer statements required by dealers to be kept should not fall within the " required records" doctrine. See, Bionic Auto Parts and Sales, Inc. v. Fahner, 721 F.2d 1972 (7th Cir. 1983) (information of which administrative regulation required record to be kept by automotive parts dealers as to alteration, defacement or removal of serial number or identifying mark of manufacturer or Secretary of State was admittedly directed at stopping alleged "chop shop" activities, information could not be said to have requisite public aspect needed to come within required records exception to the Fifth Amendment privilege).

The Sixth Circuit based its holding that the act of producing the required records is not privileged because the individuals subjected to the record keeping requirements may be deemed to have waived the Fifth Amendment privilege. It is obvious Petitioners did not intelligently, knowingly and voluntarily waive their constitutional privilege to refuse to personally produce and authenticate documents before a federal grand jury.

Purported waivers of fundamental constitutional guarantees are subject to most stringent scrutiny. An effective waiver requires an intentional relinquishment of a known right or privilege. Valid waivers must be voluntary, knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. Courts indulge every reasonable presumption against waiver of a fundamental right. United States v. Larry, 536 F.2d 1149 (6th Cir. 1976); In Re Bryan, 645 F.2d 331 (5th Cir. 1981)

A constitutional right may be waived only by voluntary and knowing action. Although waiver may be implied the facts and circumstances of each case, including the background, experience and conduct of the accused, determine whether an intelligent waiver has been made. Martin v. Rose, 744 F.2d 1245 (6th Cir. 1984). See also Groseclose Ex Rel Harris v. Dutton, 594 F. Supp. 949 (MD Tenn 1984). There has been no evidentiary finding that the Petitioners intelligently, knowingly and voluntarily waived their privilege against producing and authenticating the documents to a federal grand jury, or that their acts were done with sufficient awareness of the relevant circumstances and likely consequences.

The Sixth Circuit has held that simply by becoming car dealers, or choosing "to begin or continue to do business in an area in which the government requires record keeping, he may be deemed to have waived any Fifth Amendment protection which would otherwise be present in the absence of the record keeping regulation." 781 F.2d at 70. (Appendix A, P. 10) Nothing in

the Motor Vehicle Information and Cost Savings Act indicates that dealers will be required to produce the odometer statements to a federal grand jury. The Petitioners could not have been sufficiently aware of such consequences.

The Petitioners did not waive any privilege against providing information that would authenticate their records. Cf. United States v. Doe, 628 F.2d 694 (1st Cir. 1980) (accountant's affidavit that he prepared and maintained subpoenaed records for use in his business; admitting he prepared all the records and they were in his possession did not waive any privilege against providing further information that would authenticate the records).

The Sixth Circuit did not find that United States v. Doe, 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984) was controlling inasmuch as the U.S. Supreme Court did not have the question of producing required records before it.

> In Doe, the U.S. Supreme Court stated: Respondent filed a motion in federal district Court seeking to quash the subpoena. The District

> Court for the District of New Jersey granted his motion except with respect to those documents and records required by law to be kept or disclosed to a public agency.[3]
>
> 3. The district court mentioned tax returns and W-2 statements as examples of documents falling within this category. Respondent has not challenged this aspect of the district court's opinion. We therefore understand that this case concerns only business documents and records not required by law to be kept or disclosed to a public agency. . . . 465 U.S. at 607.

In the Supreme Court's Doe decision, the grand jury was investigating corruption in awarding county and municipal contracts. It is unlikely producing tax returns and W-2 forms would incriminate an individual on those charges. However, in this case, the grand jury is investigating violations of the Motor Vehicle Information and Cost Savings Act, and specifically odometer tampering. Obviously, producing the odometer disclosure statements could incriminate these individuals on those charges. Petitioners were required to produce their W-2 forms among other things. However, production of those items was not likely to

incriminate them on odometer tampering charges and they were produced. Similarly, Massey's possible inability to produce his odometer disclosure statements subjected him to prosecution for failure to retain the records, whereas production of W-2 forms would not subject him to incrimination on the possible odometer charges or failure to retain odometer disclosure statements. Furthermore, in the Supreme Court's Doe decision the respondent did not challenge the district court's ruling excepting the "required records" from the Court's order granting the motion to quash the subpoenas. In this instance, the Petitioners are challenging the Sixth Circuit's holding that the act of producing those required records is not privileged.

There is obvious confusion regarding the interpretation of the Supreme Court's Doe decision. The U.S. District Court, Western District of Kentucky and the U.S. District Court, Eastern District of Kentucky, sitting separately, interpreted the Supreme Court's Doe

decision to mean essentially that while the contents of documents may not be privileged, the act of producing them could be. Applying that rationale both courts determined that while the contents of the odometer disclosure statements were not privileged, the act of producing them or not producing them could be privileged. Those courts held that under the factual situations of the cases, as in Underhill, the act of producing the odometer disclosure statements would incriminate him. The district court in Massey held that both the act of producing or the act of not producing the odometer disclosure statements would incriminate Massey.

The dilemma presented is due to the fact that the U.S. Supreme Court did not address the required records exception in the Supreme Court's Doe decision because it was not presented. However, the Supreme Court's Doe decision created the obvious implication that despite the nature of the document, if the act of producing the document subjects the witness to a real and substantial risk of incrimination,

he cannot be compelled to produce the document without the grant of immunity. It is unfortunate that the U.S. Supreme Court was unable to address the issue of the required records exceptions. That question is now before it.

The Second Circuit Court of Appeals in United States v. Edgerton, 734 F.2d 913 (2nd Cir. 1984) recognized that the the Supreme Court's Doe decision may override former exceptions. In discussing the rule of third party documents, that is, that documents prepared by third parties are not protected by the privilege because they are not private papers, the Court stated:

> We do note, however, that whether such a bright line rule for third party documents is appropriate may be questionable in light of United States v. Doe, (Citation omitted). Rather, since the focus has shifted from the privacy rationale first announced in Boyd v. United States, 116 U.S. 616 (1886) to the communicative aspects of the act of production itself, Fisher v. United States, (Citation omitted), what may be protected from compelled production under one set of facts may not be protected under another. (Citation omitted). The District Court also may

> have believed that documents prepared by third parties such as W-2's and Forms 1099, might fall within the required records exception to the Fifth Amendment. . . . there is precedent for holding the W-2's and Forms 1099 are required records. . . whether the required records exception, which was a response to the Boyd privacy rationale, is still viable after the shift away from the privacy rationale, remains to be decided. (Citation omitted). 734 F.2d at 918.

The rationale underlying the Supreme Court's Doe decision is persuasive in the present case. The Fifth Amendment protects a person from compelled self-incrimination. The Court held that the contents of a sole proprietor's business records are not privileged since they are prepared voluntarily. Thereafter it stated that although the contents of a document may not be privileged, the act of producing it may be if it compels a testimonial incriminating communication.

Prior to the Supreme Court's Doe decision, private papers were usually held to be protected by the Fifth Amendment privilege. Justice O'Conner made it clear in her concurring opinion that this was no longer the rule. The required

records exception was an exception to a rule which no longer exists. A sole proprietor's business records formerly were considered private papers because the proprietorship had no legal existence apart from its owner. These private papers were protected by the Fifth Amendment privilege with the exception of those records required by law to be kept because they took on public aspects. If you throw out the rule to which the exception applies, you must throw out the exception.

The Supreme Court has made it clear that the act of production is the primary consideration in cases involving the compelled production of documents.

The production of documents is testimonial by acknowledging that the person producing them believes they are the documents requested and thereby authenticating them for purposes of Fed.R.Evid. 901. Butcher v. Bailey, 753 F.2d 465 (6th Cir. 1985). Petitioner's production of the odometer disclosure statements would be sufficient to authenticate them in any future

criminal prosecution and the Government would be relieved of the need to authenticate them.

The First Circuit Court of Appeals in In Re Kave, 760 F.2d 343 (1st Cir. 1985) has recognized that the act of production doctrine overrides the former Boyd privacy rationale.

> The rule today, however, is more limited. The compelled production of such documents is prohibited only if there are testimonial aspects to the act of production itself. 760 F.2d at 355

The Ninth Circuit Court of Appeals recently considered whether the production of documents could be compelled from a taxpayer's attorney. In Re Grand Jury Proceedings on February 4, 1982 (Terry), 759 F.2d 1418 (9th Cir. 1985). It ruled that the contents of the documents were not privileged, but the act of producing them might be. It followed the rule that if documents are transferred to an attorney to obtain legal advice, if they are unobtainable by summons from the client they are unobtainable by summons from the attorney. Therefore, the court remanded to the district court to determine if the taxpayer's act of producing the documents

would be testimonial and incriminating. The Ninth Circuit thus recognized that the overriding consideration is the act of production, not the nature of the documents. In these Petitioners' matters the District Courts have already determined that their production or non-production of the odometer disclosure statements would be testimonial and incriminating.

As to the required records exception there were two U.S. District Courts in Kentucky sitting separately that applied the act of production rationale and quashed the subpoenas. The Sixth Circuit disagreed. Basically because it refused to apply the Supreme Court's Doe decision "act of production doctrine" to the required records on the basis that the U.S. Supreme Court did not address required records in the Supreme Court's Doe decision and since it did not specifically address the required records exception, it did not overrule that exception.

The Sixth Circuit itself was confused in he application of the Supreme Court's Doe ecision act of production doctrine in its ecisions pertaining to corporate records held n a representative capacity. In its first ecision, In Re Grand Jury Proceedings Morganstern), 747 F.2d 1098 (6th Cir. 1984), acated 760 F.2d 670 (6th Cir. 1984), the Sixth ircuit ruled that the act of producing orporate records would incriminate the ubpoenaed parties and the subpoenas had to be uashed where the subpoenaed parties had not een given immunity. On rehearing en banc it eversed itself and held that under the ollective entity rule, the custodian of the orporate records would not be making any estimonial incriminating communications by roducing the corporate records and therefore he custodian's act of production was not rivileged. In Re Grand Jury Proceedings Morganstern), 771 F.2d 143 (6th Cir. 1985). ut the court went on to hold that if the overnment tried to use the custodian's act of

oduction against him in subsequent oceedings, he had Fifth Amendment protection must be granted immunity.

The question before the court is whether e act of production doctrine announced in the preme Court's Doe decision applies in a tuation where an individual is compelled to criminate himself by his act of producing or s inability to produce records required by law be kept or disclosed to a public agency, ich are held in his individual capacity.

As in the Supreme Court's Doe decision, the dges determining the factual matters both und that the act of producing the documents or e inability to produce the documents would criminate these Petitioners. Unlike the preme Court's Doe decision, where the circuit urt confirmed the factual finding of crimination, in the instant case, the Sixth rcuit held that the district courts erred in lding that the Supreme Court's Doe decision s controlling. It did not address the factual nding of incrimination.

As the Sixth Circuit noted it had no knowledge and counsel has no knowledge that any other circuit court has ruled on the application of the Supreme Court's Doe decision to required records. It is therefore important that the U.S. Supreme Court address the required records doctrine in light of the Supreme Court's Doe decision that although the contents of a document may not be privileged, the act of producing the document may be.

CONCLUSION

The impact of the decision of the Court of Appeals for the Sixth Circuit extends far beyond the harm done to these Petitioners, or for that matter beyond prospective harm to other car dealers. It extends to any individual who is required by law to keep or disclose certain documents.

The Sixth Circuit's decision effectively means that any document required by law to be kept or disclosed to an agency can be compelled by the government to be produced by an individual despite the fact that the act of producing the document may incriminate the

individual who produces it. This court has stated in the Supreme Court's Doe decision that while the contents of documents may not be privileged, the act of producing them may be and they may not be compelled to be produced without a statutory grant of immunity. Do not make the Petitioners incriminate themselves. Let the government obtain the evidence from independent sources or grant the Petitioners immunity. Wherefore, the Petitioners respectfully request that this Court review the Sixth Circuit's decision of January 13, 1986.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1985

IN RE GRAND JURY PROCEEDINGS,
RANDALL UNDERHILL, d/b/a EASTSIDE MOTORS and
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v.

UNITED STATES OF AMERICA, RESPONDENT

APPENDIX

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APPENDIX

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RECOMMENDED FOR FULL TEXT PUBLICATION (A)
See, Sixth Circuit Rule 24

Nos. 85-5127 and 85-5134

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

IN RE: GRAND JURY SUBPOENA DUCES TECUM SERVED UPON RANDALL UNDERHILL, d/b/a EAST SIDE MOTORS (85-5127, W.D.), IN RE: GRAND JURY PROCEEDINGS, WARD MASSEY (85-5134, E.D.), *Petitioners-Appellees,* v. UNITED STATES OF AMERICA, *Respondent-Appellant.*	ON APPEAL from the United States District Court for the Western and Eastern Districts of Kentucky.

Decided and Filed January 13, 1986

Before: KRUPANSKY and MILBURN, Circuit Judges; and HIGGINS, District Judge*.

MILBURN, Circuit Judge. In this consolidated appeal, we

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*The Honorable Thomas A. Higgins, Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

are asked to decide whether sole proprietors operating automobile dealerships, who are required by law to maintain and make available to federal officials and to their transferees odometer statements for motor vehicles they buy and sell, are protected by the Fifth Amendment bar against self-incrimination from producing the odometer statements in response to federal grand jury subpoenas. Because in our view the contents, as well as the act of producing the odometer statements, come within the required records exception to the Fifth Amendment, *Shapiro v. United States*, 335 U.S. 1, 68 S.Ct. 1375 (1948), we hold the statements must be produced.

I.

In the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. § 1981 *et seq.* ("the Act"), Congress banned tampering with or disconnecting odometers and required the Secretary of Transportation to prescribe rules mandating that any person who transfers a motor vehicle give written disclosure to the transferee of the mileage registered on the odometer and a notice if the odometer reading is known to be inaccurate. 15 U.S.C. §§ 1984 and 1988. In order to insure compliance with the Act and to permit its enforcement, Congress also authorized the Secretary to require automobile dealers to maintain records reasonably needed by the Secretary and to permit inspection of those records by designated federal officials. 15 U.S.C. § 1990d(a), (b), and (c)(2). Pursuant to this statutory authority, the Secretary has mandated that automobile dealers retain for four years copies of all odometer statements they issue or receive. 49 C.F.R. § 580.7. These statements must be kept at the dealer's primary place of business in a systematically retrievable order. *Id.*

In late 1984, the Department of Justice conducted investigations into possible violations of the Act by automobile dealers in Kentucky. During these investigations, the grand jury sitting in the Western District of Kentucky issued a subpoena

duces tecum to petitioner Randall Underhill, a sole proprietor doing business as East Side Motors in Murray, Kentucky.

Underhill was called to testify before the grand jury and to bring with him all odometer statements for motor vehicles he bought and sold between June 1, 1981, and June 1, 1982, as well as other required state and federal records. Underhill moved for the district court to quash the subpoena insofar as it required production of the odometer statements, contending that the subpoena required him to make incriminating testimonial communications in violation of his Fifth Amendment protection against self-incrimination.

In October 1984, as part of the same Justice Department investigations, another sole proprietor automobile dealer, petitioner Ward Massey, d/b/a A.T.V. Leasing in London, Kentucky, was commanded to appear before the grand jury sitting in the Eastern District of Kentucky. Massey was asked to bring with him, among other things, handwriting exemplars and odometer statements for motor vehicles bought and sold between April 1, 1984, and September 15, 1984.

When summoned to appear, Massey declined to furnish any of the requested records except the handwriting samples and asked that the subpoena duces tecum be quashed by the supervising district court. He argued that both the contents and the production of the odometer statements were protected by the Fifth Amendment privilege against self-incrimination.

Both district courts quashed the subpoenas duces tecum at issue. The court in the Western District of Kentucky first held that the contents of the odometer statements sought from Underhill were *not* protected by the Fifth Amendment. The court concluded that the statements themselves fell within the required records exception to the Fifth Amendment. However, the court did hold that the *act of producing* these nonprotected records was protected by the Fifth Amendment and could not be compelled unless use immu-

nity was given by the government. The court first concluded that requiring production would call for testimonial self-incrimination by Underhill. The court then based its ultimate holding on *United States v. Doe,* 104 S.Ct. 1237 (1984), wherein the Supreme Court held that the contents of voluntarily kept sole proprietorship records were not protected by the Fifth Amendment, but that their production was protected because that production would require testimonial self-incrimination by the record holder.

The court in the Eastern District of Kentucky quashed the subpoena duces tecum directed to Massey on similar grounds. The court explained that "the real question at issue here does not involve the contents of the documents, but whether the act of producing the documents themselves involves testimonial self-incrimination." The court noted that failure to maintain the odometer statements is a misdemeanor and that the government had declined to grant Massey use immunity for production of the documents, or complete immunity if he failed to keep the mandated records.

II.

A.

The first issue we must decide is whether the contents of the requested documents fall within the required records exception to the Fifth Amendment. In making this determination we are mindful that the privilege against self-incrimination must be construed so as to preserve its constitutional imperative "as a bulwark against iniquitous methods of prosecution." *United States v. White,* 322 U.S. 694, 699, 64 S.Ct. 1248, 1251 (1944). In order to meet this narrow exception, three requirements must be met. First, the purposes of the government's inquiry must be essentially regulatory, rather than criminal. Second, the records must contain the type of information that the regulated party would ordinarily keep. Third, the records "must have assumed 'public

aspects' which render them at least analogous to public documents." *Grosso v. United States*, 390 U.S. 62, 67-68, 88 S.Ct. 709, 713 (1968) (interpreting *Shapiro v. United States*, 335 U.S. 1, 68 S.Ct. 1375 (1948)).

Turning to the first *Grosso* factor, petitioners argue that the inquiry at issue is clearly criminal. Petitioners note that the proceedings from which these consolidated appeals arose were grand jury investigations into criminal activity, and in Massey's case the government stated that if Massey could not produce the documents, he likely would be prosecuted. However, in determining whether the *contents* of the documents, which were prepared prior to the grand jury subpoenas, fall within the required records exception, we believe the relevant inquiry is whether the statute and regulations which require their maintenance are regulatory in nature. Although it appears beyond question that the grand jury inquiry is criminal in nature, such is irrelevant to the present issue.

Petitioners next observe that whereas the Act places on every motor vehicle transferor the obligation of providing an odometer disclosure statement to his transferee, only dealers and distributors are required to retain the odometer disclosure statements for four years. Petitioners argue this demonstrates that the record keeping requirements are obviously motivated by the government's desire to obtain convictions for violations of the Act by providing enforcement officials with documentation to support convictions. Petitioners also argue that the legislative history of the Act demonstrates that the policy behind the Act is one of punishment, and the statute has no other purpose than to facilitate the discovery of criminal activity. Petitioners further argue that if the record keeping provisions were strictly regulatory there would be an immunity provision incorporated into the Act, and, furthermore, the Secretary would not have the authority to release information to the Attorney General for criminal investigations. *See* 15 U.S.C. § 1990d(a)(1).

We disagree. Although the specific provisions of the Act and the regulations requiring maintenance of odometer statements may have criminal application, these provisions serve the overall purpose of enforcement of an essentially regulatory program. *See In re Grand Jury Subpoena To Custodian of Records,* 497 F.2d 218, 220 (6th Cir.) (statute should be read "as a whole" to determine whether regulatory in nature), *cert. denied,* 419 U.S. 1009 (1974). Moreover, enforcement may be accomplished through either civil or criminal proceedings. For example, in addition to criminal prosecutions, the Act provides that individuals may bring civil actions for damages, 15 U.S.C. § 1989; the Attorney General and the states may seek injunctive relief, 15 U.S.C. §§ 1990 and 1990a; and the Secretary may impose a civil penalty, 15 U.S.C. § 1990b. Thus, the Act's record keeping requirements do not serve *only* criminal prosecution purposes.

The record keeping requirements of the Act are similar to the requirements upheld by the Supreme Court in *Shapiro, supra.* Although the sales records subpoenaed by the Office of Price Administration in *Shapiro* were used to compile evidence for a successful criminal prosecution, the Court nonetheless held that the required records were not protected by the Fifth Amendment. Similarly, in *United States v. Alkhafaji,* 754 F.2d 641 (6th Cir. 1985), we upheld a criminal conviction for violation of a statute that required written notice to an airline when firearms were delivered to the carrier for transportation. In holding that the statute did not violate the Fifth Amendment's protection against self-incrimination, we noted that many of the people required to give the written notice would not be acting unlawfully and that the statute was not, therefore, directed at a "highly selective and inherently suspect" group of people. 754 F.2d at 647.

This reasoning is applicable here as there is no reason to believe that the persons subject to the requirements of the Motor Vehicle Information and Cost Savings Act are any more "inherently suspect" than are persons shipping fire-

arms. *See also California v. Byers,* 402 U.S. 424, 91 S.Ct. 1535 (1971) (plurality) (state statute requiring drivers involved in motor vehicle accident to stop at scene and give name and address not directed at "selective" or "suspect" group).

Accordingly, we reject petitioner's argument that because the specific provision at issue is susceptible to use in criminal prosecutions and in fact is being so used in the instant cases, a finding of a regulatory purpose is foreclosed. To the contrary, we hold that the purpose of the Act, including its record keeping requirements, is essentially regulatory. The instant consolidated cases are distinguishable from *Grosso v. United States,* 390 U.S. 62, 88 S.Ct. 709 (1968) and *Albertson v. Subversive Activities Control Board,* 382 U.S. 70, 86 S.Ct. 194 (1965), relied on by petitioners. In *Grosso* the Court struck down a statute requiring a gambler to pay special federal taxes, and in *Albertson* the Court invalidated a statute requiring a member of the Communist Party to register with the government. Those cases involved situations wherein the information required to be disclosed inescapably implicated the individual in criminal activity. By contrast, there is nothing ordinarily criminally suspect about selling a motor vehicle, and in the vast number of cases we are confident that by complying with the Act, automobile dealers admit nothing criminal. This could not be said of the circumstances in *Grosso* and *Albertson.*

As to petitioners' argument that because only automobile dealers must keep odometer statements available for federal inspection and because the Secretary is empowered to refer known violations of the Act to the Attorney General for "investigatory consideration," the Act must have a purely criminal law purpose, we view these facts to be of limited significance. Enforcement efforts obviously must be directed primarily at dealers. Furthermore, unless persons are to be free to violate the Act with impunity, the Secretary must be able to refer matters to the Attorney General for appropriate criminal *or civil* sanctions. However, these facts do not under-

mine the basic regulatory purpose of the statute; viz., to provide consumers with accurate automobile mileage information. *See* 15 U.S.C. § 1981.

As to the second *Grosso* factor, we have no difficulty in concluding that the Act requires the maintenance of records which automobile dealers would ordinarily keep. Odometer mileage is but one aspect of the overall records that automobile dealers can be expected to maintain on motor vehicles they buy and sell, for their own protection, and in order to place a value on the vehicles.

The third *Grosso* factor is also easily met. Odometer statements maintained by automobile dealers assume "public aspects" in that every transferor is required to provide a signed copy to the buyer, 15 U.S.C. § 1988(a); 49 C.F.R. § 580.4(a), and every transferee is required to sign the statement to acknowledge receipt, 49 C.F.R. § 580.4(e). Moreover, automobile dealers must permit inspection of the records by designated federal officials. 15 U.S.C. § 1990f. Under these circumstances the odometer statements are "at least analogous to public documents." *Grosso,* 390 U.S. at 68, 88 S.Ct. at 713.

We emphasize that compliance with the record keeping requirements of the Act is not incriminating on its face. *Compare Grosso,* 390 U.S. at 66-67, 88 S.Ct. at 713, and *Albertson,* 382 U.S. at 77, 86 S.Ct. at 198, with *Byers,* 402 U.S. at 430-31, 91 S.Ct. at 1539. This is not a situation, as petitioners insist, where "Congress can completely avoid the Fifth Amendment self-incrimination privilege by simply passing a law that requires a person to keep documents of *illegal* activities and if such records of *illegal* activities are not kept that the same be designated as a crime." (Petitioners' Brief at 22) (emphasis supplied). Buying and selling automobiles is not, in and of itself, an illegal activity.

In our view, the balance between "the public need [for maintenance of odometer statements] on the one hand, and

the individual claim to constitutional protections on the other" must be struck in favor of society's interest in the maintenance of these records. *Byers, supra,* 402 U.S. at 427, 91 S.Ct. at 1537. As we have observed, the government's interest in requiring automobile dealers to maintain for inspection odometer statements is a legitimate component of the government's salutary effort to insure the accuracy of odometer statements. Moreover, requiring maintenance of the odometer records by the automobile dealers themselves is an effective and important means of advancing the statutory scheme. Finally, as we have noted, the record keeping requirement is not directed at a "highly selective group inherently suspect of criminal activities," involved in "an area permeated with criminal statutes." *Byers, supra,* 402 U.S. at 430, 91 S.Ct. at 1539. *See also Alkhafaji, supra,* 754 F.2d at 647.

B.

Having determined that the contents of the records sought by the grand jury fall within the required records doctrine, we must next determine whether the *act of producing* the odometer statements is nonetheless protected by the Fifth Amendment. Both district courts answered this inquiry in the positive and accordingly ordered the subpoenas quashed. We disagree.

In reaching their holdings, both district courts relied on *United States v. Doe,* 104 S.Ct. 1237 (1984), wherein the Supreme Court held that although the contents of voluntarily kept sole proprietorship records are not protected by the Fifth Amendment, the act of producing such records was protected where the production would require testimonial self-incrimination by the record holder. We believe the district courts erred in holding that *Doe* is controlling herein.

In *Doe* the Court carefully noted that only sole proprietorship business records other than required records were involved:

> The District Court mentioned tax returns and W-2 statements as examples of documents falling within [the category of records required by law to be kept or disclosed]. Respondent has not challenged this aspect of the District Court's opinion. *We therefore understand that this case concerns only business documents and records not required by law to be kept or disclosed to a public agency.*

104 S.Ct. at 1240 n.3 (emphasis supplied).

To our knowledge, no court has ruled on the application of *Doe* to required records. However, prior to *Doe*, three circuits held that the act of production doctrine, first enunciated in *Fisher v. United States*, 425 U.S. 391, 410, 96 S.Ct. 1569, 1581 (1976) is not applicable to required records. *See In re Grand Jury Proceedings (McCoy)*, 601 F.2d 162, 171 (5th Cir. 1979); *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 336 n.15 (3d Cir. 1982), *aff'd in part and rev'd in part on other grounds sub nom. United States v. Doe, supra*, 104 S.Ct. 1237 (1984); *In re Doe*, 711 F.2d 1187, 1191-92 (2d Cir. 1983); and *In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983*, 722 F.2d 981, 987 n.5 (2d Cir. 1983).

Two rationales are revealed by the above cases. First, because required records must have taken on a "public aspect" and because the law requires that they be kept, an individual admits little of significance by producing them. Second, if an individual chooses to begin or continue to do business in an area in which the government requires record keeping, he may be deemed to have waived any Fifth Amendment protection which would otherwise be present in the absence of the record keeping regulation. For example, the Fifth Circuit in *McCoy* stated:

> The proper designation by the government of certain records to be kept by an individual necessarily implies an obligation to produce them, and limited implied testimonial authentication. These obliga-

> tions to keep and produce the records are in a sense consented to as a condition of being able to carry on the regulated activity involved.

601 F.2d at 171. The Second Circuit in *In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983* observed:

> The governmental requirement that [records] be kept implies an obligation to produce them upon the government's demand, which amounts to a waiver of any Fifth Amendment claim with respect to the act of production. Moreover, since they are required to be kept, production of them can hardly provide the basis for an inference of criminality in possessing them.

722 F.2d at 987 n.5.

We agree with this reasoning. However, petitioners argue that *Doe*, a later case, undermines these authorities. Petitioners first suggest that the Supreme Court overruled the required records doctrine in *Doe*. Finding nothing in that opinion casting any doubt on the continuing validity of that doctrine, we decline petitioners' invitation to read *Doe* as *sub silentio* overruling *Shapiro* and its progeny.

Petitioners next appear to contend simply that because the act of producing the instant odometer statements will be incriminating, *Doe* must be applied to bar the grand jury's demand for production. The fatal flaw in petitioner's reasoning is that it overlooks the fundamental fact that the required records doctrine is an *exception* to the Fifth Amendment. *See, e.g., In re Grand Jury Subpoena to Custodian of Records, supra*, 407 F.2d at 220; *In re Doe, supra*, 711 F.2d at 1192. As such, the doctrine presupposes that compliance with the government's inquiry may be incriminating. Indeed, in *Shapiro*, petitioner was appealing from a criminal conviction. Nonetheless, the Supreme Court has directed that where the narrow parameters of the doctrine are met, and the balance weighs in favor of disclosure, the information must be forth-

coming *even in the face of potential incrimination.* This is why *Doe* is not controlling, and why, we suspect, that the Court so carefully excluded required records from the reach of its holding. In our view, in order to have meaning the required records exception must apply to the act of production as well as the contents of documents to which the doctrine applies.

We find the following language from *Byers, supra,* equally applicable to the instant consolidated cases:

> In each of these situations [where society imposes a burden of compelled disclosure to satisfy a public need] there is some possibility of prosecution—often a very real one—for criminal offenses disclosed by or deriving from the information that the law compels a person to supply. Information revealed by these reports could well be "a link in the chain" of evidence leading to prosecution and conviction. But under our holdings the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here.

402 U.S. at 428, 91 S.Ct. at 1538.

III.

Accordingly, we AFFIRM those parts of the decisions of the district courts below which hold that the contents of the requested documents are not protected by the Fifth Amendment and REVERSE the determinations by those courts that the act of producing the odometer statements is protected and REMAND these cases with instructions that the district courts rescind their orders quashing the grand jury subpoenas duces tecum.

TO: All Active Judges (B)

No. 85-5127/5134

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
FEB 27, 1986
JOHN P. HEHMAN, Clerk

IN RE:

GRAND JURY SUBPOENA DUCES TECUM SERVED UPON RANDALL UNDERHILL, d/b/a EAST SIDE MOTORS 85-5127

IN RE:
GRAND JURY PROCEEDINGS, WARD MASSEY,

Petitioner 85-5134

ORDER

BEFORE: MILBURN and KRUPANSKY, Circuit Judges; and HIGGINS, District Judge*

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing

en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

*The Honorable Thomas A. Higgins, United States District Judge for the Middle District of Tennessee, sitting by designation.

IN THE UNITED STATES DISTRICT COURT (C)
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

IN THE MATTER OF GRAND JURY SUBPOENA DUCES TECUM SERVED UPON RANDALL UNDERHILL, d/b/a EAST SIDE MOTORS

MEMORANDUM OPINION AND ORDER

This action is submitted to the Court upon the motion of Randall Underhill, doing business as East Side Motors (hereinafter ""Underhill"), to quash a subpoena duces tecum which directed him to appear before the Federal Grand Jury in Louisville and to bring with him all odometer mileage statements, including those provided to buyers and received from sellers for vehicles bought or sold by East Side Motors between and including June 1, 1981 and June 1, 1982.

Underhill contents that the subpoena should be quashed because it compels him to make incriminating testimonial communications in violation of his Fifth Amendment privilege against self-incrimination. He also contends that the requested documents are his personal business records and are not producible under

the required records doctrine and, thus, are protected by the Fifth Amendment privilege against self- incrimination.

The latest case which bears substantially on the decision in the case at bar is that of United States v. Doe, _____ U.S. _____, 104 S.Ct. 1237, 79 L.Ed. 2d 552 (1984). Mr. Justice Powell, who delivered the opinion of the Court, stated that the case presented the issue of whether and to what extent the Fifth Amendment privilege against compelled self- incrimination applies to the business records of a sole proprietorship. The Supreme Court held that where the documents were prepared voluntarily by the sole proprietor, their contents were not privileged. Id. at 559-60. However, the Supreme Court went on to hold that although the documents were not privileged, the act of producing them might be. The Court then stated that since enforcement of the subpoena would compel respondent to admit that the records existed, these communications would violate the

Fifth Amendment rights of the proprietor. Id. at 560-61.

In United States v. Doe, Supra, the Supreme Court also held that the District Court and the Court of Appeals did not have the authority to require the Government to grant to the proprietor use immunity, but did state that the act of producing the documents was privileged and could not be compelled without a statutory grant of use immunity. Id. at 563. The Court noted that the District Court had refused to quash the subpoena insofar as it pertained to documents required by law to be kept or disclosed to a public agency. Since that holding was not challenged, the Supreme Court stated that it did not reach the question as to whether or not the Fifth Amendment privilege would apply as to such public records. Id. at 557.

In three cases which were decided in one opinion emanating from the District of Rhode Island, bearing file numbers Misc. 83-118-A,

83-107-S and 83-108-S, District Judge Bruce M. Selya held that the United States had the right to subpoena business records kept by various used car firms which related to matters which were the subject of a Grand Jury investigation of possible violations of the odometer provision of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §§1981-1991, and committed mail or wire fraud, 18 U.S.C. §§1341 and 1343.

In short, the issues presented in the District Court of Rhode Island were the same as those presented here. District Judge Selya held that the Government could compel the production of the business records, provided that it granted the witness use immunity for the authentication of other testimonial information that could be implied from the witness' compliance with the subpoena. That holding cited United States v. Doe, 628 F.2d 694, 969 (1st Cir. 1980), which was reversed by the

Supreme Court on that ground but affirmed on all other grounds in United States v. Doe, Supra.

In the Rhode Island cases cited above, Judge Selya discussed discussed the required records doctrine. That doctrine was set out in Marchetti v. United States, 390 U.S. 39, 55 (1968) and was first discussed in Shapiro v. United States, 335 U.S. 1, reh. denied, 335 U.S. 836 (1948). In Shapiro, the Court held that a wholesaler of fruit and produce, who was served with a subpoena to appear before the Office of Price Administration and to produce all his sales records for a specified period of time, was not entitled to the Fifth Amendment privilege against self- incrimination or to immunity.

The Circuit Court of Appeals, in United States v. Shapiro, 159 F.2d 890 (1947) affirmed the conviction of the petitioner, ruling that the records which he was compelled to produce were required to be kept by a valid regulation under the Price Control Act, and that they

thereby became public documents as to which no constitutional privilege against self-incrimination attached. The Supreme Court affirmed the decision of the Circuit Court of Appeals, and in so doing cited with approval the following language from the case of Davis v. United States, 328 U.S. 582, 589-90 (1946), to the effect that the privilege which exists as to private papers cannot be maintained in relation "to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established." See 335 U.S. at 17.

As stated previously, in Marchetti v. United States, Supra, the Supreme Court discussed the required record doctrine. Id. at 55-57. Three principle elements of that doctrine described in Marchetti are as follows. First, the regulations must require the proprietor to keep and preserve records of the

same kind as he customarily kept; secondly, the records must have "public aspects"; and thirdly, the requirement to keep the records must be imposed in "an essentially non-criminal and regulatory area of inquiry."

In the case at bar, Underhill is required to keep records of the mileage reflected on the odometer of all cars purchased and sold by him for four years. While he contends that such records were not customarily kept by him prior to the adoption of the Motor Vehicle Information and Cost Savings Act, it would seem obvious that a used car dealer such as Underhill would, even in the absence of statute, have kept a record showing the mileage of all automobiles purchased or sold by him. It is common knowledge that used cars are sold often with emphasis upon the fact that they have only been operated a limited number of miles. Such statements could not be made without the dealer knowing, in fact, what the mileage was of the car to be sold. It is also obvious that the records have certain

public aspects since the public has the right to see those records which reflect the mileage of the cars which they are purchasing from the used car dealer. Also, the activities which the statute purports to regulate are not essentially criminal although there are, indeed, provisions in the law which call for criminal penalties.

In Marchetti, supra, the Court pointed out that "wagering is 'an area permeated with criminal statutes,' and those engaged in wagering are a group 'inherently suspect of criminal activities,' [citing] Albertson v. SACB, 382 U.S. 70, 79 [1965]." Id. at 47.

In United States v. Schlansky, 709 F.2d 1079 (6th Cir. 1983), the Court pointed out that where materials are already in existence and are fully identified and require no authentication by the taxpayer, testimony is not involved. Id. at 1082. The Court went on to state that the key question in cases pertaining to the production of business records pursuant to a subpoena

is whether the compelled production involves compelled testimonial communication. The answer to this question in turn depends on whether the very act of production supplies a necessary link in the evidentiary chain. Does it confirm that which was previously unknown to the government; e.g., the existence or location of the materials? Does it supply assurance of authenticity not available to the government from sources other than the person summonsed?" Id. at 1084.

The parties seeking to avoid compliance must make some showing that "the act of production alone would involve an incriminating testimonial communication." Id. at 1084.

In Schlansky, supra, the Court held that the documents in question could be identified by persons other than the taxpayer, and that there was no serious question as to the existence or location, and that no authentication by the taxpayer would be required. In the case at bar, the documents purportedly were signed by Underhill and his authentication would be required. Their production would require "truthtelling" by him.

The holdings in the cases cited above indicate to the Court that the contents of the

subpoenaed documents are not privileged, but that the fact of producing them is privileged and cannot be compelled without a statutory grant of use immunity, pursuant to 18 U.S.C. §§6002 and 6003. We reach this conclusion in light of our belief that United States v. Schlansky, supra; United States v. Doe, supra; United States v. Fischer, 425 U.S. 391 (1976); and Andresen v. Maryland, 427 U.S. 463 (1976), stand for the principle that while contents of business records, either voluntarily prepared or prepared as required by law, may be required to be disclosed, they also stand for the principle that if those documents require testimonial self-incrimination, as would be the case here, they cannot be required to be produced, unless the statutory grant of use immunity is made.

Our conclusion is buttressed by the recent decision of the United States Court of Appeals for the Sixth Circuit in In Re: Grand Jury proceedings, David Morganstern and Fred Morganstern, No. 84-5235 decided November 14,

1984. There the Court held that the Grand Jury could not compel the production of corporation or partnership records by the appellants where the appellants' act of production would tacitly admit the "(1) existence of the records demanded; (2) the holder's possession or control over the records demanded; and, (3) the holder's belief that those are the records described in the subpoena." Id. at 4, slip opinion. As the Court pointed out, the risk of testimonial self-incrimination was both "substantial and real." The Court also pointed out that if the appellants were given immunity, then the risk of testimonial self-incrimination would not be both "substantial and real." Id.

We, therefore, hold that the motion of Underhill is sustained.

IT IS SO ORDERED.

Dated_____

_____

Charles M. Allen, Chief Judge

cc: Counsel of Record

Entered January 7, 1985

UNITED STATES DISTRICT COURT (D)

EASTERN DISTRICT OF KENTUCKY

LEXINGTON

IN RE: GRAND JURY PROCEEDINGS

WARD MASSEY

MEMORANDUM OPINION AND ORDER

* * * * * * * * * * * *

The record reflects that on October 19, 1984, a subpoena for production of documents was served on Ward Massey, d/b/a A.T.V. Leasing, for production of the same before a Federal Grand Jury. The subpoena required Ward Massey to produce:

All odometer mileage statements, including those provided to buyers and received from sellers, for vehicles which were titled in the name of A.T.V. Leasing between and including April 1, 1984, to September 15, 1984.

When summoned before the Grand Jury, Ward Massey invoked the fifth amendment to both the act of production and the contents of the documents. This action is presently before this Court following Massey's Motion to Quash the Grand Jury subpoena.

By virtue of the fact that Ward Massey (d/b/a A.T.V. Leasing) transfers automobiles to others, he is required by law to keep odometer statements for each vehicle transferred. 49 C.F.R. §580.4. Thus, because these records are required to be kept by law, the contents of the records are not protected by the fifth amendment right against self-incrimination. See Shapiro v. United States, 335 U.S. 1, 33 (1948); Goldberg v. Truck Drivers' Local Union No. 299, 293 F.2d 807, 814 (6th Cir. 1969).

Yet, the real question at issue here does not involve the contents of the documents, but whether the act of producing the documents themselves involves testimonial self-incrimination. 15 U.S.C. §1990(f) and §1990(c)

provides, in substance, that a failure to maintain odometer mileage statements is punishable as a misdemeanor. If Massey fails to produce such odometer mileage statements by not having kept the same, he will have incriminated himself before the grand jury. When the Court addressed this question to the government, the government advised the Court that if Massey did not produce the odometer statements requested in the subpoena, then he would be prosecuted for failure to maintain such odometer mileage statements.

The Sixth Circuit Court of Appeals recently addressed this issue of whether the act of production of In Re: Grand Jury Proceedings (Morganstern), No. 84-5235 (6th Cir., November 14, 1984). Morganstern involved a Motion to Quash a Grand Jury subpoena requiring the production of both partnership and corporate records. The Motion to Quash was based on the ground that production of the records would violate the appellants' fifth amendment rights

as established by the United States Supreme Court in United States v. Doe, _____ U.S. _____, 104 S.Ct. 1237 (1984).

In Morganstern, the Court of Appeals found that the act of producing the records was privileged because it involved a risk of "substantial and real" testimonial incriminating. Morganstern, slip opn. at 4, citing U.S. v. Doe, 104 S.Ct. at 1243. The Court recognized that the act of production could require fifth amendment protection, even when the content of the records did not. Id. The Court's rationale was that a subpoena duces tecum compels the record holder to perform an act which may have testimonial aspects and incriminating effects. Id at 4. The Court, in Morganstern, went on to note that:

> . . . the appellants have not been given immunity from the testimonial self-incrimination arising from the admissions. Their risk of testimonial self-incrimination, therefore, is both 'substantial and real.' If on remand they are given immunity, then their risk of self-incrimination would not be both 'substantial and real.'

Id. at 4.

In the instant case, the government advised the Court in a hearing that if Massey did not produce the records required by law, he would be prosecuted. Thus, this Court is of the opinion that the act of production or non-production of said records constitutes a risk of testimonial self-incrimination which is both "substantial and real." This is true even if the contents of the records are required to be kept and thus are not protected.

If the government concludes to give Massey immunity from the testimonial self-incrimination arising from production or non-production of these records, then Massey's risk of testimonial self-incrimination would be neither "substantial nor real," and therefore the fifth amendment protection would not apply. Yet, as it now stands, the subpoena duces tecum must be quashed.

The Court being so advised, IT IS NOW ORDERED HEREIN that:

(1) Ward Massey's Motion to Quash the Grand Jury subpoena duces tecum is GRANTED.

(2) The United States is directed to FILE notice stating whether it will seek to immunize Ward Massey from the incriminating effects arising from compliance with said subpoena.

This 15th day of January, 1985.

SCOTT REED, JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY

F I L E D

Jan. 15, 1985

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(E)

NO. 85-5127/5134

IN RE:	:	
	:	
GRAND JURY SUBPOENA DUCES TECUM SERVED UPON RANDALL UNDERHILL, D/B/A EAST SIDE MOTORS (85-5127)	:	F I L E D
	:	
GRAND JURY PROCEEDINGS, WARD MASSEY, (85-5134)	:	March 14, 1986
	:	JOHN P. HEHMAN, CLERK
Petitioners	:	

ORDER STAYING MANDATE

ORDERED, That Motion to Stay Mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition,

record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN, CLERK

_____
LEONARD GREEN, CHIEF DEPUTY

(F)

15 U.S.C. §1984 Change of mileage indicated on odometer prohibited

No person shall disconnect, reset, or alter or cause to be disconnected, reset, or altered, the odometer of any motor vehicle with intent to change the number of miles indicated thereon.

§1990c. Criminal penalties

(a) Maximum amounts

Any person who knowingly and willfully commits any act or causes to be done any act that violates any provision of this subchapter or knowingly and willfully omits to do any act or causes to be omitted any act that is required by any such provision shall be fined not more than $50,000 or imprisoned not more than one year, or both.

(b) Liability of director, etc., of corporation

Any individual director, officer, or agent of a corporation who knowingly and willfully authorizes, orders, or performs any of the acts or practices constituting in whole or in part a violation of any section of this subchapter shall be subject to penalties under this section without regard to any penalties to which that corporation may be subject under subsection (a) of this section.

§1990d. Inspections and investigation

(b) Recordkeeping requirements

For the purpose of enabling the Secretary to determine whether any dealer or distributor has acted or is acting in compliance with this subchapter or any rules, regulations, or orders issued thereunder, each dealer and distributor shall -

(1) Maintain such records as the Secretary may reasonably require to make such determination;

(2) Permit an officer or employee duly designated by the Secretary, upon request of such officer or employee, to inspect appropriate books, papers, records and documents relevant to making such determination; and

(3) Provide such officer or employee information from records required to be maintained under this subsection as the Secretary finds necessary for such determination if the Secretary (A) provides the reason or purpose for requiring such information, and (B) identifies to the fullest extent practicable such information.

Nothing in this subsection authorizes the Secretary to require a dealer or distributor to provide information on a regular periodic basis.

18 U.S.C. § 6002

"Whenever a witness refused, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to -

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." Section 6003 provides:

"(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment -

(1) the testimonial or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

PW116

Supreme Court, U.S.
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No. 85-1668

In the Supreme Court of the United States

OCTOBER TERM, 1985

RANDALL UNDERHILL, d/b/a EASTSIDE MOTORS, AND WARD MASSEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether sole proprietor automobile dealers who are statutorily obligated to keep records of the odometer readings of the vehicles that they buy and sell, and to make those records available for inspection, may assert a Fifth Amendment privilege to refuse to produce those records in response to grand jury subpoenas.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 781 F.2d 64. The opinions of the district court for the Western District of Kentucky (Pet. App. 15-25) and of the district court for the Eastern District of Kentucky (Pet. App. 26-31) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1986. A petition for rehearing was denied on February 27, 1986 (Pet. App. 13-14). The

petition for a writ of certiorari was filed on April 12, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Motor Vehicle Information and Cost Savings Act (the Act), 15 U.S.C. 1901 *et seq.*, Congress found that automobile purchasers rely on odometer readings in determining a vehicle's safety, condition, and value. 15 U.S.C. 1981. Congress accordingly prohibited tampering with or disconnecting odometers. 15 U.S.C. 1984. It directed the Secretary of Transportation (the Secretary) to prescribe rules mandating that any transferor of a motor vehicle give the transferee written disclosure of the mileage registered on the car's odometer, as well as a notice if the odometer reading is known to be inaccurate. 15 U.S.C. 1988. Similarly, Congress authorized the Secretary to require automobile dealers to maintain and permit inspection of records needed for enforcement of the Act. 15 U.S.C. 1990d(a), (b) and (c)(2). Pursuant to this statutory authority, the Secretary has promulgated regulations that, among other things, require car dealers to keep and make available for federal on-site inspection the odometer statements of vehicles that they bought and sold during the preceding four years. 49 C.F.R. 580.7. Congress also created (15 U.S.C. 1990, 1990b, 1990c) civil and criminal penalties for violations of the Act or its implementing regulations.

2. Petitioners Massey and Underhill are sole proprietors who operate used car dealerships that are subject to the statutory and regulatory requirements described above. In late 1984, a federal grand jury sitting in the Western District of Kentucky was in-

vestigating possible violations of the Act. It issued a subpoena to Underhill. He was called to testify and was directed to bring with him odometer statements for automobiles that he had bought and sold during a specified period. Pet. App. 2-3. Underhill responded by asking the district court to quash the subpoena, contending that the subpoena required him to make incriminating testimonial communications in violation of the Fifth Amendment (*id.* at 3).

In October 1984, Massey was subpoenaed by a federal grand jury sitting in the Eastern District of Kentucky. Massey was asked to appear and to bring with him, among other things, odometer statements for automobiles that he had bought and sold during a particular period. Pet. App. 3. Like Underhill, Massey moved the district court to quash his subpoena, arguing that the demand that he produce the odometer statements violated his Fifth Amendment privilege against self-incrimination (*ibid.*).

The district courts granted the respective motions to quash (Pet. App. 15-25, 26-31). Both courts initially held that the odometer records, being records that the government requires regulated parties to keep and make available for inspection, fell within the so-called "required records" exception to the Fifth Amendment. The district courts accordingly found that the *contents* of the records were not protected by the privilege against self-incrimination. Pet. App. 23-24, 27. Relying on *United States* v. *Doe*, 465 U.S. 605 (1984), however, both district courts concluded that "the act of production or nonproduction of said records constitutes a risk of testimonial self-incrimination which is both 'substantial and real' " (Pet. App. 30; see *id.* at 22-23). For this reason, the courts held that the grand jury de-

mands for production of the records "require[d] testimonial self-incrimination" (*id.* at 24; see *id.* at 30), and therefore were inconsistent with the Fifth Amendment.

3. In a consolidated appeal, the court of appeals unanimously reversed (Pet. App. 1-12). At the outset, the court of appeals agreed with the district courts that the odometer records themselves fall within the "required records" exception to the Fifth Amendment privilege. The court explained that the exception is applicable when three conditions are met: "First, the purposes of the government's inquiry must be essentially regulatory, rather than criminal. Second, the records must contain the type of information that the regulated party would ordinarily keep. Third, the records 'must have assumed "public aspects" which render them at least analogous to public documents.'" Pet. App. 4-5 (quoting *Grosso* v. *United States*, 390 U.S. 62, 67-68 (1968)).

The court of appeals found each of these conditions satisfied here. While it recognized that the subpoenas were issued in the course of a criminal investigation (Pet. App. 5), the court explained that the provisions governing the contents of the odometer records, and requiring that such records be kept for four years, are key components of the Motor Vehicle Information and Cost Savings Act and hence "serve the overall purpose of enforcement of an essentially regulatory program" (*id.* at 6). The court also had "no difficulty in concluding that the Act requires the maintenance of records which automobile dealers would ordinarily keep" (*id.* at 8). And it found that odometer records "assume 'public aspects' in that every transferor is required to provide a signed copy to the buyer, and every transferee is required to sign

the statement to acknowledge receipt" (*ibid.* (citations omitted)).

Having found that the odometer statements fall within the "required records" doctrine, the court of appeals went on to reverse the district court holdings that the act of producing the records is nonetheless protected by the Fifth Amendment. The court of appeals noted that this Court's decision in *Doe* involved the act of producing *voluntarily kept* sole proprietorship records; the Court expressly stated its " 'understand[ing] that th[e] case concern[ed] only business documents and records not required by law to be kept or disclosed to a public agency' " (Pet. App. 9-10 (quoting 465 U.S. at 607 n.3)). The court of appeals thus ruled that the holding of *Doe* was of no help to petitioners. The court of appeals further concluded (Pet. App. 10-11) that the rationale behind the required records exception—that an individual admits little of significance when he discloses records that have a "public aspect," and that an individual who conducts business in an area in which the government requires record-keeping may be deemed to have waived any Fifth Amendment protection against disclosure of those records—was no less valid after *Doe* than it was previously (*id.* at 11).

The court of appeals therefore rejected petitioners' argument that the Fifth Amendment privilege must be applicable here because the act of producing the odometer records might reveal incriminating information. This argument, the court explained, "overlooks the fundamental fact that the required records doctrine is an *exception* to the Fifth Amendment." Pet. App. 11 (emphasis in original). Indeed, the court found that "in order to have meaning, the required records exception must apply to the act of

production as well as [to] the contents of documents to which the doctrine applies" (*id.* at 12).

ARGUMENT

The decision below is correct. Petitioners do not allege, nor is there, a conflict among the circuits on the question presented. There accordingly is no basis for further review.

1. Petitioners first assert (Pet. 7-8) that the odometer records at issue in this case do not fall within the category of "required records" whose disclosure is unprotected by the Fifth Amendment. Petitioners insist that the statutory provisions obligating them to retain odometer records are criminal rather than regulatory in nature, stating that they "fail to see any regulatory purpose" for requiring retention of the records "other than as evidence for use for either civil or criminal sanctions for odometer tampering" (*id.* at 7). They accordingly suggest that the records themselves are privileged. This argument, however, is grounded on a fundamental misunderstanding of the "required records" doctrine.

As the court of appeals explained, the relevant inquiry in a case of this sort is whether the record-keeping requirement at issue aids in the enforcement of a program that is essentially regulatory in nature. See *California* v. *Byers*, 402 U.S. 424, 430 (1971) (plurality opinion); *Grosso* v. *United States*, 390 U.S. 62, 67-68 (1968). The Act, which is designed to facilitate commerce by providing consumers with important information, plainly satisfies that criterion. See generally *United States* v. *Alkhafaji*, 754 F.2d 641, 648 (6th Cir. 1985); *United States* v. *Flores*, 753 F.2d 1499, 1501-1502 (9th Cir. 1985) (en banc) (citing cases). That petitioners' documents were

sought by a grand jury does not change the regulatory and non-investigative environment in which those documents were *created*, and thus does not make the "required records" exception inapplicable. See *Shapiro* v. *United States*, 335 U.S. 1 (1948). Cf. *United States* v. *Doe*, 465 U.S. 605, 610-612 (1984).

2. Petitioners also contend (Pet. 11-12) that the court of appeals' holding is inconsistent with *United States* v. *Doe*, *supra*. The Court there held, in part, that the act of producing records that had been voluntarily prepared by a sole proprietorship amounted to "testimonial self-incrimination," and hence that production of the documents could not be compelled (465 U.S. at 612-614). Petitioners assert that this "act of production" doctrine is applicable even when the documents requested are "required records"—that is, records which by law must be created and made available for inspection.

In the absence of a conflict in the circuits on the question presented—an absence conceded by petitioners (Pet. 22)—there is no need for the Court to revisit the implications of the act-of-production doctrine as recently set forth in *Doe*. But petitioners' contention is, in any event, without merit. The proposition that the act of producing records may itself provide incriminating information was first articulated not in *Doe*, but rather in *Fisher* v. *United States*, 425 U.S. 391, 410 (1976). See *Doe*, 465 U.S. at 613. In the years since the *Fisher* decision, each court of appeals that has considered the question has held, as the court below did, that the act of producing documents does not implicate the Fifth Amendment when the documents requested are "required records."

These courts have reasoned correctly that "[t]he governmental requirement that [records] be kept im-

plies an obligation to produce them upon the government's demand, which amounts to a waiver of any Fifth Amendment claim with respect to the act of production." *In re Grand Jury Subpoenas Duces Tecum*, 722 F.2d 981, 987 n.5 (2d Cir. 1983). Thus, "[i]n this respect, the mere response [to a subpoena] by production is no more a violation of the privilege against self-incrimination than requiring the creation of the record itself, for it is the record, presumably, that might incriminate." *In re Grand Jury Proceedings (McCoy)*, 601 F.2d 162, 171 (5th Cir. 1979). Accord, *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 336 n.15 (3d Cir. 1982), aff'd in part and rev'd in part on other grounds, 465 U.S. 605 (1984). Obviously, it would not do the government much good to require that records be kept unless the government also could require that the records be produced for it to see. This Court's decision in *Doe*, which specifically stated the Court's understanding that its holding did not extend to required records (see 465 U.S. at 607 n.3), is entirely consistent with this analysis.[1]

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[1] Petitioners insist (Pet. 9-10) that they have not knowingly and intelligently waived their Fifth Amendment privilege. The courts, however, never have looked for a formal waiver of rights in the "required records" context: "The[] obligations to keep and produce the records are in a narrow sense consented to as a condition of being able to carry on the regulated activity involved." *McCoy*, 601 F.2d at 171. Cf. *Donovan* v. *Dewey*, 452 U.S. 594 (1981). The premise of the "required records" doctrine is that regulated parties are *deemed* to have waived objection to production of the documents at issue; if a formal waiver had to be demonstrated on the facts of each particular case, the "required records" doctrine would be meaningless.

The courts of appeals are thus unanimous in their agreement that the act-of-production doctrine is inapplicable here. Congress made the creation of odometer records—and the production of those records for inspection by the Secretary—a condition of doing business as a used car dealer. Cf. *Donovan* v. *Dewey*, 452 U.S. 594 (1981). Indeed, Congress specifically authorized the Secretary to provide the information obtained through such inspections to the Attorney General "for investigative consideration." 15 U.S.C. 1990d(a)(1). Persons who operate used car dealerships are presumptively aware of these requirements, and accordingly must conduct their operations with these provisions in mind. The fact that compliance with these provisions may reveal information that could be useful in a prosecution does not change this conclusion. To the contrary, as the court of appeals emphasized, the "required records" doctrine is an exception to the Fifth Amendment, and "[a]s such, the doctrine presupposes that compliance with the government's inquiry may be incriminating" (Pet. App. 11).[2]

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[2] In analogous circumstances, this Court explained that, while "[i]nformation revealed by [required] reports could well be a 'link in the chain' of evidence leading to prosecution and conviction, * * * the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here." *Byers*, 402 U.S. at 428 (plurality opinion).

CONCLUSION

The petition for a writ of certiarari should be denied.

Respectfully submitted.

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